

Town of



Amherst Massachusetts

TOWN CLERK

Sandra J. Burgess, Town Clerk
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BYLAW APPROVAL **BY STATE ATTORNEY GENERAL**

I, Sandra J. Burgess, Town Clerk of Amherst, Massachusetts certify that the attached is a true copy of the amendments to the Zoning Bylaws adopted under Article 13, of the warrant for the Special Town Meeting that convened November 4, 2013, with the approval of the Attorney General of Massachusetts, herewith.

Attest:

Sandra J. Burgess
Town Clerk
April 22, 2014

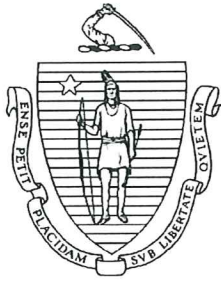
Any claims of invalidity in the case of Zoning Bylaws by reason of any defect in the foregoing procedure of adoption may only be made within 90 days of the posting of this notice.

Date posted April 23, 2014

On the above date written I have posted copies of the bylaw amendments passed at the November 4, 2013 Special Town Meeting and approved by the Attorney General of Massachusetts on February 20, 2014, at the following places in town:

Precinct 1	North Amherst Post Office	Precinct 6	Fort River School
Precinct 2	North Fire Station	Precinct 7	Crocker Farm School
Precinct 3	Immanuel Lutheran Church	Precinct 8	Munson Memorial Library
Precinct 4	Amherst Post Office	Precinct 9	Wildwood School
Precinct 5	Town Hall	Precinct 10	Campus Center, UMass

Constable, Town of Amherst



MARTHA COAKLEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

CENTRAL MASSACHUSETTS DIVISION
10 MECHANIC STREET, SUITE 301
WORCESTER, MA 01608

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April 22, 2014

Sandra J. Burgess, Town Clerk
Town of Amherst
4 Boltwood Ave.
Amherst, MA 01002

**RE: Amherst Special Town Meeting of November 4, 2013 - Case # 7000
Warrant Articles # 13, 14, 15, 16, 17, and 18 (Zoning)**

Dear Ms. Burgess:

Article 13 – We approve Article 13 from the Special Town Meeting of November 4, 2013.¹ Article 13 amends the Town's zoning by-law to add a new Section 3.360.4, Registered Marijuana Dispensaries. Section 3.360.4 makes a number of changes to various sections of the Town's zoning by-laws in order to establish where, and under what conditions, medical marijuana facilities may be allowed in the Town's zoning districts. The vast majority of these provisions present no conflict with state law or the Constitution, including the application requirements (Section 3.360.4(2)), the use regulations (Section 3.360.4 (3)(a)), the locational and physical requirements (Section 3.360.4 (3) (b)), the reporting requirements (Section 3.360.4(3)(c)), the transfer/discontinuance of use requirements (Section 3.360.4(3)(d) and most of the prohibitions (Section 3.360.4(3)(e).

But we have concerns about the constitutionality of the sign content restriction in Section 3.360.4 (3) (e) (2) (b) (iii), as detailed below (see pp. 2-3). On the limited record available to the Attorney General in review of town by-laws, we cannot disapprove and delete this provision in Section 3.360.4 (3) (e) (2) (b) (iii). However, we encourage the Town to consult with Town Counsel regarding this provision as noted below. We also offer comments regarding the by-law's definitions of marijuana uses.

I. Attorney General's Standard of Review.

Pursuant to G.L. c. 40, § 32, the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal by-laws." *Amherst v. Attorney General*, 398 Mass. 793, 795-96 (1986). The Attorney General does not review the policy arguments for or against the enactment. *Id.* at 798-99

¹ In a decision issued February 20, 2014 we approved Articles 14, 15, 16, 17 and 18.

(“Neither we nor the Attorney General may comment on the wisdom of the town’s by-law.”) Rather, in order to disapprove a by-law (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the Constitution or laws of the Commonwealth. Id. at 796. “As a general proposition the cases dealing with the repugnancy or inconsistency of local regulations with State statutes have given considerable latitude to municipalities, requiring a sharp conflict between the local and State provisions before the local regulation has been held invalid.” Bloom v. Worcester, 363 Mass. 136, 154 (1973) (emphasis added). “The legislative intent to preclude local action must be clear.” Id. at 155.

II. Summary of Article 13.

Article 13 adds to the Town’s zoning bylaw a new Section 3.360.4 to regulate Medical Marijuana Treatment Centers and Off-Site Medical Marijuana Dispensaries (both as defined in the by-law). The new provisions establish that such uses may be located in certain Districts in Town by special permit, and establish various special permit application requirements, operational requirements, and prohibited activities.

Section 3.360.4 (3) (e) (2) governs signage and advertising (emphasis added):

The proposed use shall not display:

- a) Off-premises signage; or
- b) On-premises signage or other marketing on the exterior of the building or in any manner visible from a public way, which, in the opinion of the Special Permit Granting Authority, may promote or encourage:
 - i. The use or abuse of marijuana or other drugs for non-medical purposes; or
 - ii. The use or abuse of marijuana or other drugs by minors; or
 - iii. ***The active marketing or (sic) marijuana or other drugs for medicinal purposes.***

An exception shall be that the Special Permit Granting Authority shall not prohibit signage which is required by the MA Department of Public Health.

The text reflected in bold and italics above prohibits any signs from promoting “the active marketing of marijuana...for medicinal purposes.”² However, Chapter 369 of the Acts of 2012 (“An Act for the Humanitarian Medical Use of Marijuana”) allows qualifying patients with debilitating medical conditions to obtain marijuana for medical use from registered marijuana dispensaries. The Act makes the use of marijuana for medicinal purposes a lawful activity, so long as the marijuana is dispensed and used in compliance with the Act and the Department of Health (DPH) Regulations implementing the Act ((105 CMR 725.000)). It thus appears that a sign that “active[ly] market[s]” marijuana for medicinal purposes would concern a lawful activity, which is one of the factors giving rise to First Amendment protection for commercial speech, as explained below.

² In light of the apparent typographical error in the by-law this appears to be the intended wording of the text in Section 3.360.4 (3) (e) (2) (b) (iii).

III. First Amendment Protection for Commercial Speech.

Commercial speech (such as that regulated under Article 13) is subject to the First Amendment, but is afforded a lesser measure of protection than other types of speech. United States v. Edge Broadcasting Co., 509 U.S. 418, 426 (1993). The Supreme Court has developed the following framework for determining the validity of a regulation of commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). Relying on Central Hudson, courts have invalidated Massachusetts regulations governing the advertising of smokeless tobacco and cigars (Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001)) and a City of Worcester ordinance prohibiting the outdoor advertising of tobacco products (National Assoc. of Tobacco Outlets v. City of Worcester, 851 F.Supp. 2d 311 (D. Mass. 2012)).

The Central Hudson test requires a detailed factual record which the Attorney General does not receive from the towns in her review of town by-laws pursuant to G.L. c. 40, § 32.³ A determination of the validity of the sign provision would involve consideration of evidence and determination of factual issues going well outside the bounds envisioned by G.L. c. 40, § 32. However, based on the Central Hudson, Lorillard and City of Worcester decisions, we are concerned that the prohibition against the “active marketing” of marijuana for medicinal purposes (Section 3.360.4 (3) (e) (2) (b) (iii)) would not withstand constitutional scrutiny. Therefore, we recommend that the Town consult with Town Counsel regarding this provision.⁴

³ For example, the Central Hudson test requires an analysis of whether the sign is “misleading,” and whether the governmental interest which supports the by-law is “substantial.” Central Hudson, 447 U.S. at 566. The materials required to be submitted to this Office per G.L. c. 40, § 32 do not include any information on those factors, and we therefore cannot determine the validity of the sign provision on this limited record. We note, however, that the first factor (the speech must concern lawful activity) would seemingly be satisfied.

⁴ We note that the DPH regulations implementing the Act, 105 CMR 725.000, include the following prohibitions at 105 CMR 725.105(L):

(3) A RMD shall not display on the exterior of the facility advertisements for marijuana or any brand name, and may only identify the building by the registered name.

(4) A RMD shall not utilize graphics related to marijuana or paraphernalia on the exterior of the RMD or the building in which the RMD is located.

The by-law’s sign content restriction at Section 3.360.4 (3) (e) (2) (b) (iii) is consistent with the regulations, but goes further by prohibiting any “active marketing” of marijuana for medicinal purposes.

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IV. Definitions of Medical Marijuana Uses.

Article 13 adopts definitions for a "Medical Marijuana Treatment Center (MMTC)," and an "Off-Site Medical Marijuana Dispensary (OMMD)." These definitions are different from the definitions for Medical Marijuana Treatment Center found in the Act and the DPH regulations. Because of this, the by-law definitions may cause some confusion for special permit applicants and the Special Permit Granting Authority. In addition, the Town cannot apply the by-law definitions in a way that conflicts with the Act or regulations. We recommend the Town consult closely with Town Counsel on this point.

Finally, while we approve the remaining portions of Article 13, the Town should take care to apply the amendments in a manner that does not conflict or interfere with the operation of 105 CMR 725.000. We encourage the Town to consult with Town Counsel on this issue.

Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were voted by Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours,
MARTHA COAKLEY
ATTORNEY GENERAL

Margaret J. Hurley

by: Margaret J. Hurley, Assistant Attorney General
Chief, Central Massachusetts Division
Director, Municipal Law Unit
Ten Mechanic Street, Suite 301
Worcester, MA 01608
(508) 792-7600 x 4402

cc: Town Counsel Joel Bard

ARTICLE 13
Form 2 – Submission 2
TOWN MEETING ACTION

VOTED by a declared two-thirds to amend Section 3.360, Medical Uses, and Article 12, of the Zoning Bylaw, as follows:

A. Under Section 3.360, Medical Uses, add a new Section 3.360.4, as follows:

3.360.4 Registered Marijuana Dispensaries (RMDs)

3.360.40 Medical Marijuana Treatment Center (MMTC)

R-O														
R-LD	R-N	R-VC	R-G	R-N	B-G	B-L	B-VC	B-N	COM	OP	LI	PRP	FPC	
N	N	N	N	N	SP	SP*	SP	N	SP	SP	SP	N	N	

*Allowed only in those B-L Districts which co-occur with the R&D overlay district. For other standards and conditions see Section 3.360.41.

See definition under Article 12.

3.360.41 Off-Site Medical Marijuana Dispensary (OMMD)

R-O														
R-LD	R-N	R-VC	R-G	R-N	B-G	B-L	B-VC	B-N	COM	OP	LI	PRP	FPC	
N	N	N	N	N	SP	SP	SP	N	SP	SP	SP	N	N	

Standards and Conditions

See definition under Article 12.

1. **Purposes.** It is recognized that the nature of the substance cultivated, processed, and/or sold by medical marijuana treatment centers and off-site medical marijuana dispensaries may have objectionable operational characteristics and should be located in such a way as to ensure the health, safety, and general well-being of the public as well as patients seeking treatment. The specific and separate regulation of Registered Marijuana Dispensaries (RMDs) as Medical Marijuana Treatment Centers (MMTCs) and Off-site Medical Marijuana Dispensaries (OMMDs) facilities is necessary advance these purposes and ensure that such facilities are not located within close proximity of minors and do not become concentrated in any one area within the Town of Amherst.

Subject to the provisions of this Zoning Bylaw, Chapter 40A of the Massachusetts General Laws, and 105 CMR 725.000, MMTCs and OMMDs will be permitted to provide medical support, security, and physician oversight that meet or exceed state regulations as established by the Massachusetts Department of Health (DPH).

2. **Application Requirements.** Above and beyond the standard application requirements for Special Permits, an application for a use under this section shall include the following:
 - a) The name and address of each owner of the facility/operation;
 - b) Copies of all required RMD registrations issued to the applicant by the Commonwealth of

Massachusetts and any of its agencies for the facility;

- c) Evidence that the Applicant has site control and the right to use the site for a facility in the form of a deed or valid purchase and sale agreement, or, in the case of a lease, a notarized statement from the property owner and a copy of the lease agreement;
- d) A notarized statement signed by the organization's Chief Executive Officer and corporate attorney disclosing all of its designated representatives, including officers and directors, shareholders, partners, members, managers, directors, officers, or other similarly-situated individuals and entities and their addresses. If any of the above are entities rather than persons, the Applicant must disclose the identity of all such responsible individual persons;
- e) In addition to what is normally required in a site plan pursuant to Section 11.2, details showing all exterior proposed security measures for the premises, including lighting, fencing, gates and alarms, etc. ensuring the safety of employees and patrons and to protect the premises from theft or other criminal activity.
- f) A Management Plan as required under the Rules and Regulations of the Special Permit Granting Authority, including a description of all activities to occur on site, including all provisions for the delivery of medical marijuana and related products to OMMDs or off-site direct delivery to patients.
- g) A traffic impact report as set forth in the Rules and Regulations of the Special Permit Granting Authority shall be developed and submitted with the application.

3. Regulations. The following regulations shall apply to uses under this section:

a. Use Regulations.

- 1) Uses under this section may only be involved in the uses and activities permitted by its definition as limited by state law, and may not include other businesses or services in the same building.
- 2) No marijuana shall be smoked, eaten or otherwise consumed or ingested on the premises.
- 3) The hours of operation shall be set by the Special Permit Granting Authority, but in no event shall a facility be open to the public, nor shall any sale or other distribution of marijuana occur upon the premises or via delivery from the premises, between the hours of 8:00 p.m. and 8:00 a.m.

b. Locational and Physical Requirements

- 1) All aspects of a MMTC or OMMD relative to the acquisition, cultivation, possession, processing, sales, distribution, dispensing, or administration of marijuana, products containing marijuana, related supplies, or educational materials must take place at a fixed location within a fully enclosed building and shall not be visible from the exterior of the business.
- 2) No outside storage of marijuana, related supplies, or educational materials is permitted.
- 3) No MMTC shall have a gross floor area in excess of 25,000 square feet.
- 4) No OMMD facility shall have a gross floor area accessible to patients which is in excess of 2,500 square feet, except as may be permitted under 3., e., 1), c). Space in an OMMD facility which is dedicated to administration or operations and is accessible only to employees of the facility shall not be included in this limitation.
- 5) Ventilation – all facilities shall be ventilated in such a manner that:
 - a) No pesticides, insecticides or other chemicals or products used in the cultivation or processing are dispersed into the outside atmosphere; and
 - b) No odor from marijuana or its processing can be detected by a person with an unimpaired and otherwise normal sense of smell at the exterior of the MMTC or OMMD facility or at any adjoining use or property.
- 6) A number of signs determined to be sufficient by the Special Permit Granting Authority shall be displayed on the exterior of the facility's entrance in plain sight of clients stating that "Registration Card Issued by the MA Department of Public Health Required" in text two inches in height.

c. Reporting Requirements

- 1) All Special Permit holders for uses under this section shall provide the Police Department, Fire Department, Building Commissioner, Board of Health, and Special Permit Granting Authority with the names, phone numbers, mailing and email addresses of all management staff and key-holders, including a minimum of two (2) operators or managers of the facilities identified as designated contact persons to whom notice should be made if there are operating problems associated with any

- use under this section. All such contact information shall be updated as needed to keep it current and accurate.
- 2) The designated contact persons shall notify the Police Department, Fire Department, Building Commissioner, Board of Health, and Special Permit Granting Authority in writing:
 - a) A minimum of thirty (30) days prior to any change in ownership or management of a facility regulated under this section, and
 - b) A minimum of twelve (12) hours following a violation, a potential violation, or any attempts to violate any applicable law, or any criminal, potential criminal, or attempted criminal activities at a facility regulated under this section.
 - 3) The designated representatives of permitted facilities shall file an annual report with the Special Permit Granting Authority and shall appear before said Authority to present the report no later than January 31st of each year, providing a copy of all current applicable state licenses for the owners and facilities, to demonstrate continued compliance with the conditions of the Special Permit.
 - 4) The designated contact persons shall be required to respond by phone or email within twenty-four (24) hours of the time of contact and inquiry regarding operation of the facility by a town official to the telephone number or email address provided as the contact for the business.
- d. Transfer/Discontinuance of Use
- 1) A Special Permit granted under this Section is non-transferable and shall have a term limited to the duration of the applicant's ownership of the premises as a MMTC or OMMD.
 - 2) Any MMTC or OMMD permitted under this section shall be required to remove all material, plants equipment and other paraphernalia in compliance with 105 CMR 725.105 (J), (O) prior to expiration of its DPH Registration or immediately following revocation or voiding of its DPH Registration.
- e. Prohibitions.
- 1) The building(s) in which the proposed uses occur shall not be located:
 - a) Within three hundred (300) feet of any building:
 - i. containing another MMTC or OMMD; or
 - ii. in which is located a public or private elementary school, middle school, secondary school, preparatory school, licensed daycare center, or any other facility in which children commonly congregate in an organized ongoing formal basis; or
 - iii. owned by and operated as part of the campus of any private or public institution of higher learning, or
 - iv. housing a public library; or
 - v. any residential use, excepting a mixed-use building under Section 3.325; or
 - b) Within, on the same lot as, or on a lot immediately adjacent to a licensed pharmacy; or
 - c) Within buildings that contain any pharmacy, medical doctor offices or the offices of any other professional practitioner authorized to prescribe the use of medical marijuana. An exception shall be that the Special Permit Granting Authority may grant permission for palliative and therapeutic care uses in the same building in which an MMTC or OMMD is operated; or
 - d) Within a building containing residential units, including transient housing or group housing such as hotels, motels, lodging houses, or dormitories.
 - 2) The proposed use shall not display:
 - a) Off-premises signage; or
 - b) On-premises signage or other marketing on the exterior of the building or in any manner visible from a public way, which, in the opinion of the Special Permit Granting Authority, may promote or encourage:
 - i. The use or abuse of marijuana or other drugs for non-medical purposes; or
 - ii. The use or abuse of marijuana or other drugs by minors; or
 - iii. The active marketing of marijuana or other drugs for medicinal purposes.An exception shall be that the Special Permit Granting Authority shall not prohibit signage which is required by the MA Department of Public Health.

4. Findings. In addition to the findings required under Section 10.38, and meeting the provisions of Articles 7, 8, and all other applicable sections of this Bylaw, the Special Permit Granting Authority shall find that the proposed use:
- a. Meets a demonstrated need.
 - b. Meets all of the permitting requirements of all applicable agencies within the Commonwealth of Massachusetts and will as proposed be in compliance with all applicable state laws and regulations.
 - c. Is designed to minimize any adverse visual or economic impacts on abutters and other parties in interest.
 - d. Provides a secure indoor waiting area for patients.
 - e. Provides an adequate pick up/drop off area.
 - f. Provides adequate security measures to ensure that no individual participant will pose a direct threat to the health or safety of other individuals, and that the storage and/or location of cultivation of marijuana is adequately secured in enclosed, locked facilities.
 - g. Adequately addresses issues of vehicular and pedestrian traffic, circulation, parking and queuing, especially during peak periods at the facility, and adequately mitigates the impacts of vehicular and pedestrian traffic on neighboring uses.

B. Add the following new definitions to Article 12, Definitions, in alphabetical order and re-enumerate the remaining existing sections accordingly:

12. ___ Medical Marijuana Treatment Center (MMTC): A use operated by a not-for-profit entity registered and approved by the MA Department of Public Health in accordance with 105 CMR 725.000, and pursuant to all other applicable state laws and regulations, also to be known as a Registered Marijuana Dispensary (RMD), that acquires, cultivates, possesses, processes (including development of related products such as food, tinctures, aerosols, oils, or ointments), transfers, transports, sells, distributes, dispenses, or administers marijuana, products containing marijuana, related supplies, or educational materials to registered qualifying patients or their personal caregivers. An MMTC shall explicitly include facilities which cultivate and process medical marijuana, and which may also dispense and deliver medical marijuana and related products.
12. ___ Off-Site Medical Marijuana Dispensary (OMMD): A medical marijuana facility that is located off-site from any cultivation/processing facility that is controlled and operated by the same registered and approved non-profit entity which operates an affiliated MMTC but which serves only to dispense the processed marijuana, related supplies and educational materials to patients registered and qualified under the provisions of 105 CMR 725.00 or their personal caregivers.

Action taken 11/6/2013

A true copy, Attest:



Sandra J. Burgess
Town Clerk

Town of



Amherst Massachusetts

TOWN CLERK

Sandra J. Burgess, Town Clerk
Town Hall
4 Boltwood Avenue
Amherst, MA 01002-2351

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Constable, Town of Amherst